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No. 88-532

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT B. ASHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's mail fraud convictions should be reversed in light of *McNally* v. *United States*, No. 86-234 (June 24, 1987).

2. Whether the court of appeals erred in finding that the introduction of a particular document against petitioner, though erroneous, was nonetheless harmless under the circumstances of this case.

3. Whether the district court impermissibly amended the indictment, which identified petitioner as a public official, when it charged the jury that petitioner was instead a party official.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-73a) is reported at 854 F.2d 1483. The opinion of the district court denying petitioner's motion to dismiss the indictment is reported at 648 F. Supp. 320.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1988. A petition for rehearing was denied on August 18, 1988 (Pet. App. 76a). The petition for a writ of certiorari was filed on September 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of conspiracy to commit mail fraud and to violate the Travel Act, 18 U.S.C. 1952, in violation of 18 U.S.C. 371; five counts of mail fraud, in violation of 18 U.S.C. 1341; three counts alleging interstate travel in aid of bribery, in violation of 18 U.S.C. 1952; and one count of making false declarations in a federal court proceeding, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of a year and a day on each count, and to fines totalling $205,000.[1] The court of appeals affirmed (Pet. App. 1a-73a).

1. The unchallenged evidence at trial, which was briefly outlined by the court of appeals (Pet. App. 2a, 4a-6a) and in the government's brief below (Gov't C.A. Br. 2-12), showed that in 1983, shortly after he was elected chairman of the Republican Party in Pennsylvania, petitioner received a telephone call from attorney William T. Smith. In response to Smith's request for assistance, petitioner set up a meeting between a representative of the Governor and John Torquato, Smith's client and an official in CTA, Limited (CTA), a corporation that specialized in recovering overpaid Social Security (FICA) taxes for businesses and their employees.

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[1] Petitioner was prosecuted along with Pennsylvania Commonwealth Treasurer R. Budd Dwyer, who was convicted on the same charges as petitioner. Dwyer committed suicide the day before his sentencing. Co-conspirator William T. Smith, Jr., was convicted in an earlier trial, and his conviction was affirmed on appeal. *United States* v. *Smith*, 789 F.2d 196 (3d Cir.), cert. denied, 479 U.S. 1017 (1986). Co-conspirator John R. Torquato pleaded guilty to one count of conspiracy.

Before meeting with the Governor's representative, Smith and Torquato stopped at petitioner's office to express their desire that Pennsylvania award CTA a contract to recover the FICA overpayments. Smith explained at the meeting that if CTA were awarded the contract it would be prepared to make a $300,000 campaign contribution, to be divided among the Treasurer, the Treasurer's re-election campaign, and the Republican State Committee. Notwithstanding these efforts, the Governor's office did not award the contract to CTA. Pet. App. 4a-5a. Instead, state personnel completed the State's recovery of FICA overpayments at a cost of approximately $200,000, substantially less than the $3.5 to $4.5 million that CTA would have charged (Gov't C.A. Br. 3).

Subsequently, a state statute was proposed that would remove the authority to award FICA recovery contracts from the Governor's office and assign it to the State Treasurer, then R. Budd Dwyer. In anticipation of the passage of the proposed legislation, Torquato made a presentation to Dwyer in March 1984, outlining the benefits that Dwyer would realize by awarding a FICA recovery contract to CTA. During that meeting, Torquato or Smith suggested to Dwyer that substantial contributions might be made to Dwyer's re-election campaign in exchange for the contract (Pet. App. 5a-6a; Gov't C.A. Br. 4). Approximately ten days later Smith explicitly promised Dwyer $300,000 for the contract; of that sum, one-third would be a personal payment, one-third would be for his re-election committee, and one-third would be for the state party committee. Dwyer gave his approval to the offer and requested time to speak with petitioner about the state committee payment (Gov't C.A. Br. 5). When petitioner met with Smith and Torquato several days later, however, petitioner said that they could not make any

direct payments to Dwyer, but that instead they must pay the entire $300,000 to the state committee (*id.* at 6).

Thereafter, Smith called petitioner frequently to enlist petitioner's help in the negotiations with Dwyer. Torquato also sent petitioner copies of all his CTA correspondence in connection with the contract proposal. Ultimately, Dwyer awarded CTA the state contract, notwithstanding the substantially lower bid submitted by Arthur Young, Inc., a national accounting firm (Pet. App. 6a). CTA's contract was voided several months later, after it became known that the FBI was investigating the circumstances surrounding its award. After further bids were submitted, the State awarded the contract to another large accounting firm that charged substantially less than CTA (Gov't C.A. Br. 12).

The indictment and prosecution for mail fraud, both of which predated this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), were predicated on the theor / that the defendants defrauded the citizens of Pennsylvania of both tangible and intangible rights. As the district court explained to the jury, the indictment charged that the defendants defrauded the citizens of Pennsylvania of their intangible right to honest and disinterested services by government officials who owed a fiduciary duty to the State and that, by accepting bribes in this case, they defrauded the people of " 'tangible savings coming from an impartially awarded contract' " (see Pet. App. 26a (emphasis omitted)).

2. On appeal, petitioner urged that his convictions on the conspiracy and mail fraud counts be reversed in light of *McNally*, and he contended further that the Travel Act and false declaration counts were tainted by the other erroneous convictions. The court of appeals concluded otherwise. The court reviewed a number of post-*McNally*

decisions, including this Court's decision in *Carpenter* v. *United States*, No. 86-422 (Nov. 16, 1987), and summarized the case law as follows (Pet. App. 23a (emphasis in original)):

> [T]hose cases that have *sustained* mail fraud convictions have done so where the "bottom line" of the scheme or artifice had the inevitable result of effecting monetary or property losses to the employer or to the state. This common thread appears despite references in the indictments, proofs, or instructions to violations of intangible rights.
>
> Essentially, therefore, where rights are involved whose violation would lead to no concrete economic harm, and where those rights are the only rights involved in the case, *McNally*'s proscriptions would prevent upholding conviction on appeal. Where, on the other hand, a violation of the rights involved would result in depriving another of something of value, and the indictment, the proofs and the instructions are based on that fact, then the presence of intangible rights language will not prove fatal on appeal.

The court then noted that both the indictment and the jury instructions here referred specifically to tangible as well as intangible losses (Pet. App. 24a-26a). The court further found that, despite the reference in the instructions to intangible rights, the court was "unable to hypothesize a set of circumstances under which this jury could have found [petitioner] guilty of depriving the citizens of the Commonwealth of their right to honest government (an impermissible intangible right under *McNally*) without also having found that [petitioner] was involved in a scheme, the sole purpose of which was to ensure that CTA obtained a no-bid FICA recovery contract at a substan-

tially greater cost to the Commonwealth than a contract obtained through traditional competitive bidding" (Pet. App. 26a-27a). The court explained: "[E]very aspect of the charged crime considered by the jury in this case involved some potential tangible loss to the Commonwealth. Indeed, even without regard to the $300,000 bribe promised by Torquato for the CTA contract, the contract itself deprived the Commonwealth of tangible savings that it would have derived from a less expensive agreement" (*id.* at 27a). Consequently, the court declined to reverse petitioner's convictions on *McNally* grounds.

The court of appeals also rejected petitioner's claim that the district court improperly amended the indictment by referring to him as a "party official" in the jury instructions. The court noted that while the indictment used the term "public official," it also clearly identified petitioner as "Chairman of the State Republican Committee of Pennsylvania." The court pointed out that Pennsylvania's bribery statute was applicable regardless of whether petitioner was a public official or an officer of a political party. The court concluded that the jury could not have assumed that petitioner owed the same duties to the public as a public official, because the district court had instructed the jury carefully regarding the distinction between petitioner's party official status and the public position of Treasurer Dwyer, and the different rights and duties of each. The court of appeals therefore rejected petitioner's claim that the instructions constituted an improper amendment of the indictment, since the indictment was not "broaden[ed]" by the reference in the instructions to "party official"; the court also found that the conspiracy conviction was proper because at least one member of the conspiracy, Treasurer Dwyer, was a public official; and it reiterated that the indictment when read as a whole

gave sufficient notice of petitioner's status to protect him against unfair surprise at trial. Pet. App. 28a-32a.

Petitioner's final contention was that a prior written statement by co-conspirator William Smith was erroneously admitted into evidence. The court of appeals found that the evidence should not have been admitted against petitioner. It concluded, however, that other, properly admitted evidence performed the same function as the improper evidence and thus rendered the error harmless (Pet. App. 36a-38a). One judge dissented, but only on the harmless error point (*id.* at 40a-72a).

ARGUMENT

1. Petitioner first renews his claim (Pet. 11-19) that this Court's construction of the mail fraud statute in *McNally* v. *United States, supra*, requires reversal of his convictions because the indictment referred to the objects of petitioner's scheme as being both intangible rights and tangible property.

Whatever the merits of petitioner's claim, it presents an issue that is not of sufficient continuing importance to warrant this Court's review. Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603 (Nov. 18, 1988). The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17375 (daily ed. Nov. 10, 1988). Accordingly, petitioner's contention that the indictment improperly charged him with an "intangible rights" fraud is not a claim that has any prospective importance.

Although there have been a number of decisions in the courts of appeals applying *McNally* to cases tried before *McNally* was decided, not many cases of that sort remain unresolved. There is accordingly no pressing need for this Court to review the decision in this case in order to give guidance to the lower courts in disposing of the few pre-*McNally* cases that have not yet reached final judgment. Moreover, as the court of appeals stated, whether a particular pre-*McNally* conviction should be upheld depends on the specific facts of the case and on whether the court is satisfied that the jury must have found a deprivation of a property interest in light of the charge, the evidence, and the instructions. The case are therefore inherently fact-bound, and a ruling in this case would not provide a general rule of decision for even that small class of pre-*McNally* cases that remains to be resolved by the courts of appeals.

Apart from these threshold reasons why review by this Court is not warranted, the court of appeals was correct in rejecting petitioner's legal argument on the merits. *McNally* involved a scheme in which the defendants, who controlled the selection of Kentucky's workers' compensation insurer, selected an agency that agreed to pay the defendants a portion of the commissions it received from underwriting the policy. The defendants were charged and convicted of mail fraud on the theory that their scheme had deprived the citizens of Kentucky of their intangible right to honest government. Holding that the mail fraud statute is "limited in scope to the protection of property rights" (slip op. 10), this Court reversed. The Court explained that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property" (*ibid.*). In fact, the Court determined in that case that Kentucky did not lose money because it appeared that nothing the defendants

did actually affected the amount Kentucky paid for insurance or the amount the agency received as commissions. Rather, the Court explained, "the premium for insurance would have been paid to some agency" and, hence, the commissions that the defendants shared "were not the Commonwealth's money" (*ibid.*). All that Kentucky lost, as the Court subsequently noted in *Carpenter* v. *United States*, slip op. 6, was the defendants' "honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute."

In this case, the court of appeals correctly concluded that the scheme contemplated a loss to Pennsylvania of property within the meaning of *McNally*. The scheme contemplated that CTA would receive a contract substantially more expensive to the State than a competing bid presented by a legitimate company that was not party to the fraud. As the court below found (Pet. App. 24a-27a), the indictment, proof, and jury instructions focused on monetary loss—"every aspect of the charged crime considered by the jury in this case involved some potential tangible loss to the Commonwealth" (*id.* at 27a). The indictment charged that the scheme "was designed to 'grant, or cause to be granted, lucrative FICA recovery contracts without competitive bidding, notwithstanding the fact that others were willing to perform substantially identical FICA recovery work at a much lower cost,' " and thus " 'to defraud the citizens * * * of tangible monetary savings and financial benefits' " (*id.* at 24a-25a). The evidence overwhelmingly demonstrated actual monetary loss to Pennsylvania (*id.* at 24a n.19). And the jury instructions referred repeatedly to actual economic loss.[2] Hence, as the

[2] The Third Circuit elaborated on its decision here in a subsequent decision, *United States* v. *Zauber*, 857 F.2d 137 (1988), where it reversed mail and wire fraud convictions in light of *McNally* on the

court of appeals concluded (*id.* at 27a), this case is quite unlike *McNally*.[3]

Petitioner's allegation of a conflict between the decision below and the First Circuit's decision in *United States* v. *Ochs*, 842 F.2d 515 (1988), does not bear up. On the facts presented in *Ochs*, the court of appeals held that the jury could have convicted the defendant of mail fraud even without finding that the City of Boston, the alleged victim of the scheme, would lose money as a result of the defendant's activities. Indeed, the government specifically argued that point to the district judge in rebutting defendant Ochs' argument at the instruction conference that the jury could find a deprivation of intangible rights only if the Boston official was paid a kickback. In this case, the government's theory throughout was that the kickback scheme involved a substantial monetary injury to the Commonwealth. The First Circuit concluded that the jurors in *Ochs* could have found that the City of Boston was not actually defrauded of money, even though it lost the faithful services of an employee who operated under an impermissible conflict of interest (842 F.2d at 525). By

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ground that the convictions were based on an intangible rights theory and the jury instructions did not ensure that the factfinder also found that property interests were implicated. The *Zauber* case makes it clear that the court of appeals has not disregarded *McNally* or given it a grudging interpretation, but instead has conducted a case-by-case analysis to determine whether a particular conviction rested on an "intangible rights" fraud or a fraud based on the deprivation of property.

[3] Other courts of appeals have likewise noted that kickback schemes usually involve property loss within the meaning of *McNally* by inflating the victim's costs. *United States* v. *Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), cert. denied, No. 87-1946 (Oct. 3, 1988); *United States* v. *Piccolo*, 835 F.2d 517 (3d Cir. 1987), cert. denied, No. 87-1465 (May 31, 1988); *United States* v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987); *United States* v. *Fagan*, 821 F.2d 1002 (5th Cir. 1987), cert. denied, No. 87-589 (Jan. 11, 1988).

contrast, the court below concluded that the jury could not have made such a finding on the facts of this case.[4] Accordingly, the conclusions of the two courts of appeals, based as they are on different evidence presented in different prosecutions, do not present the sort of legal conflict that merits this Court's attention.

2. Petitioner next contends (Pet. 19-23) that the court of appeals erred in finding that the evidence that was erroneously admitted at trial did not prejudice petitioner. The evidence at issue is a written multi-paragraph statement made by William Smith in 1984, in which he asserted that petitioner " 'was our principle aide in getting Dwyer to act' " (Pet. App. 32a). The government offered the document under Fed. R. Evid. 801(d)(1)(B) as a prior consistent statement to rehabilitate Smith's credibility after attack by co-defendant Dwyer. Petitioner objected at trial to the admission of the document on the ground that *he* did not challenge Smith's credibility. Petitioner, however, did not ask for a limiting instruction restricting the jury's consideration of the statement. Pet. App. 32a-38a.

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[4] Petitioner notes (Pet. 17-18) that, as in *Ochs*, the prosecutor in this case argued to the district court that the allegations of intangible rights fraud could stand separately from the allegations of a scheme to defraud Pennsylvania of its money. However, the district court did not agree with the prosecutor's position and its instructions to the jury explicitly referred to tangible losses by the Commonwealth. For that reason, the court of appeals explicitly found (Pet. App. 24a n.19) that "[i]t is apparent from the record that neither the court nor the parties ever reached a clear resolution of this issue prior to the time the court delivered its charge to the jury. * * * Thus, despite the confusion as to what the parties agreed upon with respect to the jury instructions * * *, we are satisfied that both the indictment and the jury charge contained references to tangible losses by the Commonwealth sufficient to have made those losses an integral part of the government's case."

On appeal, petitioner urged that the admission of the statement was prejudicial error. The court of appeals agreed with petitioner's argument that he had not directly challenged Smith's credibility; it thus agreed that under these circumstances the statement was not admissible against petitioner under Rule 801(d)(1)(B). The court did not reach the question whether the evidence was admissible against petitioner's co-defendant, nor did it consider the effect of petitioner's failure to seek a limiting cautionary instruction. Instead, the court concluded that the error was harmless because another witness's in-court testimony made the same point as the pertinent sentence in Smith's written statement. In particular, the court relied on the testimony of Smith's attorney, who explained in some detail how Smith and Dwyer agreed to discuss the kickback scheme with petitioner, and how petitioner suggested the way the kickback should be paid. The attorney further testified about the difficulties Smith had in his negotiations with Dwyer; he explained that Smith urged petitioner to intercede with Dwyer and that petitioner assured Smith from time to time that he was doing so. Pet. App. 37a. That testimony, the court held, closely paralled Smith's statement that petitioner "was our principal aide in getting Dwyer to act" (*id.* at 32a).

Petitioner's challenge to the decision below—that the court of appeals' finding of harmlessness was incorrect—raises only a factual disagreement that does not merit further review by this Court. In any event, his specific objections to the finding of harmlessness are insubstantial. First, while it is true that the attorney's testimony did not characterize petitioner's role in the scheme as did Smith's statement, the attorney's testimony made exactly the same point, and in even more detail than Smith's statement. The attorney's testimony established that Smith "was begging [petitioner] to communicate with

Dwyer to help them out" and that petitioner "assured [Smith] from time to time that he was doing so" (Pet. App. 37a). Second, the fact that the attorney's testimony came *after* the admission of Smith's written statement, rather than *before* it, should not count for much in the harmless error determination, particularly since the attorney's testimony was more detailed on the point at issue than the written statement. Likewise, the fact that the prosecutor adverted to Smith's written statement in his closing argument, and that that statement was available to the jury during its deliberations, are not particularly significant factors. The prosecutor's argument did not focus exclusively on the written statement, but focused on the attorney's testimony as well. If the statement had been excluded from evidence, the prosecutor's closing argument would have been almost exactly the same, except that it would have referred exclusively to the attorney's testimony, and not to both that testimony and the written statement. And since the attorney's testimony was clear and detailed on the point, it was of no moment that the less detailed Smith statement was available to the jury in exhibit form during deliberations.

3. In the indictment, petitioner was identified as the Chairman of Pennsylvania's Republican State Committee (Introduction ¶ 20), and co-defendant Dwyer was identified as the state Treasurer (*id.* ¶ 19). In Count 1, as well as in the false declaration counts, the indictment also identified the "named defendants" as "public officials" (Count 1 ¶ 3(c), Count 12, Count 13). Count 1 further alleged that petitioner and Dwyer "would be corruptly influenced by various means and methods," including the offers of large political campaign contributions as well as money and other things of value (Count 1 ¶ 3(f)), in exchange for which they would award FICA recovery contracts (*id.* ¶¶ 3(g) and (h)). In the listing of overt acts, meetings

between petitioner and others were alleged, but those allegations did not identify petitioner as a public official or suggest that he acted at those meetings in some governmental capacity (see *id.* Overt Acts ¶¶ 1, 20, 25); other overt acts that made direct reference to public officials or the performance of governmental acts did not refer to petitioner in that context (*id.* ¶¶ 2, 29, 30, 31, 32, 44, 45, 47).

In its jury instructions, the court charged that petitioner was a "party official"—which, unlike the indictment term "public official," is used in the Pennsylvania bribery statute[5]—and the court instructed the jury that it could find petitioner guilty in his capacity as a "party official" (Pet. App. 28a). Petitioner contends (Pet. 24-28) that by that jury instruction the district court improperly amended the indictment. The court of appeals disagreed (Pet. App. 31a-32a), in an analysis with which we concur.

As the court of appeals explained, to constitute reversible error the variance between the language of the indictment and the instruction at trial must be sufficiently substantial that it "act[s] to modify the indictment" in a way that permits conviction for a crime not charged (Pet. App. 31a). Thus, in *Stirone* v. *United States*, 361 U.S. 212 (1960), instructions that identified an interstate nexus different from that alleged in the indictment were error. At the same time, changes that do not broaden the scope of the indictment are not necessarily reversible error; the inquiry then shifts to whether the defendant was somehow prejudiced by the change. See *United States* v. *Castro*, 776 F.2d 1118, 1122 (3d Cir. 1985), cert. denied, 475 U.S. 1029 (1986). For example, if the change is merely formalistic or constitutes a narrowing of the scope of the charges, prej-

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[5] The statute refers to "public servant[s]" and "party official[s]" (18 Pa. Cons. Stat. Ann. § 4701 (Purdon 1983)).

udice will not readily be found. See *United States* v. *Miller*, 471 U.S. 130 (1985).

Addressing the particular facts of this case, the court of appeals concluded that identifying petitioner as a party official rather than as a public official did not prejudice petitioner. The court noted that the state bribery statute alleged to have been violated prohibited bribery of both "public servant[s]" and "party official[s]." 18 Pa. Cons. Stat. Ann. § 4701 (Purdon 1983). Thus, had the indictment alleged that petitioner was a party official and that as a party official he accepted an unlawful bribe, his conviction would have been unassailable. As the court noted, the elements of the offenses on which petitioner was convicted were unaffected by the change in identification of his legal status from public to party official (Pet. App. 32a). The court found that the indictment "properly gave notice of the crime for which [petitioner] was convicted and was sufficient to permit [petitioner] to plead his conviction as a bar to subsequent prosecutions" (*ibid.*).[6]

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[6] To the extent that petitioner suggests (Pet. 24-25) that the decision below is in conflict with *United States* v. *Castro*, 776 F.2d 1118, 1121-1122 (3d Cir. 1985), cert. denied, 475 U.S. 1029 (1986), and *United States* v. *De Cavalcante*, 440 F.2d 1264, 1271 (3d Cir. 1971), he claims at most an intracircuit conflict that does not merit further review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, those cases stand for the proposition that a variance between the indictment and the proof at trial must be prejudicial in order to justify a reversal. They also stand for the proposition that an amendment to an indictment occurs when the prosecutor or the court effectively alters the language of the indictment to charge a different crime from the one charged in the original indictment. Because the court in this case found that the district court's instruction did not effectively present the jury with a different crime from the one presented in the indictment, and because the court found that petitioner was not prejudiced by the variance between the indictment and the proof, the court of appeals in this case was faithful to its prior precedents.

Nor did the government change its theory between the time of indictment and the time of trial. Petitioner contends that the theory began as one of official corruption but ended as one in which petitioner "was bribed in an attempt to influence his conduct of party affairs" (Pet. 26). That suggestion is incorrect; the government did not prosecute the case on the notion that petitioner was corrupted in his management of the Republican party, and the instructions were not founded on a theory that petitioner was wrongfully influenced in the conduct of party affairs. Rather, the focus of the government's case was on corruption in the award of a government contract, with the rewards to the government officials being the payment of campaign contributions on their behalf in exchange for public favors. The evidence showed that petitioner directly participated in that corrupting process notwithstanding his lack of an official public office.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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